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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. _____

WILLIAM EARP,
Petitioner,

v.

THE STATE OF WASHINGTON
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF WASHINGTON, DIVISION I

MICHAEL W. HERB
Counsel of record for petitioner and
DONALD HUGH HEDGES,
(member of the Bar of the U.S. Supreme Court and co-counsel)
6132 196th S.W.
Lynnwood, Washington 98036

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The petitioner, William Earp, respectfully prays that a Writ of Certiorari issue to review the July 30, 1979 Washington State Court of Appeals opinion (6574-I), the Supreme Court of the State of Washington having denied a petition to review this opinion on November 9, 1979.

OPINIONS BELOW

The Washington State Court of Appeals issued its unpublished opinion on July 30, 1979,

affirming a Washington State Superior Court judgment and sentence, entered on May 16, 1978. William Earp made a timely motion for reconsideration in the State Court of Appeals and that was denied on August 20, 1979. He petitioned for discretionary review to the Washington State Supreme Court and that Court declined to hear the petition on November 9, 1979. The judgment, sentence, Court of Appeals opinion, denial for reconsideration and the State Supreme Court denial as well as the search warrant affidavit and trial Court order denying motion to suppress (February 7, 1978) are appended hereto, in Appendix.

JURISDICTIONAL GROUNDS

On November 9, 1979, the Washington State Supreme Court, the highest Court in the State, entered an order which is a final order, denying a review of petitioner's case. Petitioner had appealled to the State Court of Appeals (opinion rendered on July 30, 1979, affirming trial Court), had a request for reconsideration in that Court denied and then filed the petition for review in the State Supreme Court. The questions petitioner seeks re-

view on are Federal search and seizure issues, involving the 4th amendment to the U.S. Constitution. Mishkin v N.Y. (383 U.S. 502, 16 L Ed 2d 56, 86 S Ct 958). The issues were properly and timely raised at the trial court level, in a motion to suppress, prior to trial. Petitioner seeks review on this petition pursuant to 28 U.S.C. Sec 1257 (3). The state conviction rests on the grounds of an unlawful search; if the petitioner's arguments are upheld, the case can not be sustained on any remaining grounds.

QUESTIONS PRESENTED

1. Is a search prohibited by the 4th amendment to the U.S. Constitution if the supporting affidavit was prepared with a reckless disregard for truth, when police added such mistatements as "hot", "stolen" and from a "burglary", when the remaining facts did not constitute probable cause (one person helping another privately sell water skiis)?

2. Is a search valid if the searching officers go beyond the limits of the search warrant in the scope and intensity of the search?

3. If the petitioner is denied his constitutional right because the Courts below made findings of fact from a record that was totally devoid of evidentiary support or the trial Court failed to make a finding on a basic question of fact, should the U.S. Supreme Court examine the record to determine what facts might be reasonably found?

4. Can police continue to search for evidence, pursuant to a warrant, if they already have sufficient evidence on the point and the additional evidence would be merely cumulative?

5. Is a search valid if the supporting affidavit contains only conclusory statements without details or underlying circumstances showing that the informants were credible or the information reliable?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of United States amendment IV, Searches and seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Three water skiis for sale at Village Transmission-nothing suspicious.

William Earp, petitioner, owned and was managing his transmission shop in the summer of 1977, when a friend, Doug Stewart, had left three O'Brien water skiis in the shop office, to see if someone would buy them. (R120, 121) The skiis had no specific identification, such as serial numbers. (R 161) Earp himself was not trying to sell them, had not paid much attention to them and was not familiar with them at all (R 128, 144, 120).

Doug Stewart was trying to sell the skiis for a price that was consistent with wholesale prices in the area (R 135). O'Brien skiis are sold through dealers throughout the metropolitan Seattle area and are a popular type of ski (R 148).

About July 25, 1977, Earp was approached by

two young men in blue jeans who inquired about the skiis. He didn't know they were police officers. They were checking because there had been a burglary several months earlier, in another city near Seattle, of O'Brien skiis. There was nothing about these skiis, however, to relate them to any burglary (R 161, 164). Earp had never been in any trouble with the law or ever convicted of any crime (R 63).

One of the men said he was interested in buying a "competitor." Earp didn't know what that was and suggested they talk to Doug who was trying to sell the skiis.

The officers went back to their office and prepared a search warrant for a search of the premises.

2. Police insert false information into affidavit, including addition of words "hot" and "stolen" and that these skiis were from a burglary.

In the affidavit for the search warrant, the police made mistatements in almost every line. They inserted the word "hot" once and the word "stolen" three times, in describing the skiis (R 143, 150, 94, 92). They falsely stated that

the "hot" skiis were being offered for sale in "ten-lot sales for $85.00 per lot" after just observing that only 3 individual skiis were offered for sale, (R 164-5, 176-7) they put in that the skiis were being offered for sale at prices far below wholesale prices, which was not true, (R 135) and that "the skiis had been stolen from O'Brien manufacturing plant", according to a telephone call from a man named Schaplow. They falsely stated that "an unknown man" advised a dealer, Precision Specialty, Inc. of Bellevue, Washington, "that he had purchased a stolen water ski at Village Transmission in Edmonds for $100.00." (R 150)

A copy of the affidavit and search warrant is attached to this petition (in appendix).

The police did not have evidence that any property at Village Transmission had been stolen (R150).

They had alleged in the affidavit that the burglary at the manufacturers was an inside job but in fact they didn't really believe it was an inside job (R 158). A portion of the affidavit stated:

"That a citizen informant advised police on or about July 19, 1977 that the stolen skiis were being sold at the Village Transmission shop described above; that this informant has no prior criminal record, to the best of your affiants knowledge, and based his information upon a telephone call he received from one Walter E. Schaplow of Lynnwood, who reportedly offered to arrange a sale of "hot" water skiis in ten-lot sales for $85.00 per lot ..... That in the telephone call mentioned above, Mr. Schaplow allegedly reported that the skiis had been stolen from the O'Brien manufacturing plant and that the brother-in-law of the owner of the Village Transmission shop took part in the burglary."

What actually happened was that someone had learned of skiis for sale and had made an inquiry at the Seattle Police Department to see if they knew about any missing skiis. Detective Moore of that Department checked and learned of a burglary in Redmond, Washington so called the person back and referred the one inquiring to Detective Yaeger in the Redmond Police Department (R 142). The one calling had said he was

frightened, according to Detective Moore (R 144).

The caller hadn't talked about any burglary. It was Detective Moore who told the inquirer there had been a burglary (R 144).

The prosecutor stipulated that if the caller were to testify, there wouldn't be any reference to "hot" or "stolen" skiis but that:

> " ..... he had spoken with Walter Shaplow by telephone in July, 1977, at which time Shaplow said he had 5000 water skiis for sale; that these skiis had been purchased by an individual who had bought out the stock of a business; that the individual with the skiis was the brother of Shaplow's former employer at Village Transmission shop; and that the skiis were being kept in a cabin, the whereabouts of which were not revealed."

The prosecutor further stipulated that were the "informer" to testify he would say he never knew any skiis were even at Village Transmission and never told anyone any skiis were there (R 94, 99). The defense was never able to have the inquirer ("the informer") in Court because the prosecutor refused to comply in a timely

manner with a court order requiring disclosure of the informants identity so the defense was pressured into using the above "stipulated" affidavit of the prosecutor (R 78, 82, 85 and particularly 91 and 92).

Shaplow verified that he never had any information about "stolen" skiis and never told anyone he did. He never used words like "hot" or "stolen" with anyone. He was only aware that Doug Stewart was trying to sell some skiis. (R 94)

Schaplow had talked to "the informer" about some skiis, who was just someone making an inquiry to the Seattle Police Department, who was then referred to Detective Yaeger in Redmond, who passed his views on to officer Hamilton who communicated with Officer Delong, of the Everett, Washington Police Department, who submitted the affidavit.

The affidavit states that the informant has no criminal record. Actually the police didn't know. All they knew about him was a name and address. (R 143)

The affidavit alleged sales of skiis in 10 lot

sales for $85.00 per lot. Detective Moore had only received the above described inquiry, not an allegation about "10 lot sales" (143, 145), nor had Detective Yaeger (R149).

Another paragraph in the affidavit stated:

> "That on or about July 22, 1977, an unknown young man advised a dealer of O'Brien water skiis, Precision Specialty, Inc. of Bellevue, Washington, that he had purchased a stolen O'Brien water ski, "Competitor" model at the Village Transmission shop in Edmonds for $100.00;
>
> That this information was relayed to police, however the young man left before the dealer could ascertain his name or address;"

There is no company called "Precision Specialty, Inc." (R 95). Nor had any officer or anyone else been told that someone purchased a "stolen" ski at Village Transmission.

Detective Yaeger's explanation of that paragraph was that an employee in some store in Bellevue Washington had heard someone say they purchased a ski at a transmission shop in Edmonds "for about ½ price." (R 150) The police

added to that hearsay, the word "stolen", the label "competitive model" and the price of $100.00.

The police put in to the affidavit that Earp told them he could get a "competitor"ski. Earp never said this. He said he didn't know much about the skiis and the police later (in court) confirmed this and even put in their police reports that he didn't know much about the skiis. (R 170 and 171)

3. An Exploratory Search - officer admits it

The search was wild. (R112) Police went all over, searching everything. It was "hard to believe." (R112)

The search warrant was for "O'Brien water skiis, particularly the "competitor", "World Team Comp", "Wood Comp" and "Exhibition Comp" models, and any business records or evidence related to ownership and occupancy of the premises" and the premises designated was Village Transmission.

The search began with officers DeLong and Beckdolt, two days after their first visit, still acting as if they wanted to buy a ski. William Earp summoned Doug Stewart who was next door

and then he continued to work on a car. The police offered to buy the two skiis from Doug Stewart and then produced the search warrant.

They were in the office area in the front of the shop, took a property tax statement, utility bill, bank statement and some business cards as evidence of ownership of the premises. (R 170)

Detective Yaeger went on an exploratory search. He was not looking for evidence of ownership. He decided to "ignore this question of ownership" (R 156) and "stay out of the search end of the thing." (R157) He wasn't looking for evidence of ownership yet looked into rooms, cabinets and containers that were too small to fit skiis into. (R157) He eventually proceeded in to a storage attic, deep in the shop, upstairs, went inside by several steps because there is a wall inside that storage area that partially blocks the view, from the doorway, and discovered an old World War II "grease gun" in a box. His testimony, in part, was as follows:

"Q. You weren't looking for evidence of ownership, then?

A. I was not, No.

Q. So if that box was closed, it was too small to fit water skiis into, isn't that correct?

A. Yes, it would be." (R 157)

Other officer's had seized the three skiis in the front office and the tax statements and other evidence of ownership of the premises had been seized and large numbers of police officer's proceeded to look through everything; tool boxes, under hoods of cars, through old magazines, lockers and desks (R 112) and they even turned a davenport upside doen (R 128). They searched in an adjacent "compound yard" and into a nearby "parts building." The only thing found were the three original skiis in the front office and the grease gun in the attic storage area.

William Earp is a gun collector and had the gun in a box there because he was worried his children would get into it if he kept it at home. (R 127)

In the upstairs storage area, he had old office records stored (12 years of invoices) and the gun was in a box stapled shut and in an area "not generally accessible to employees" (R 131-133). Detective Yaeger testified the box

was open. (R154) He had found it while the police were in the next room "going through the lining of a lounge chair." (R 113)

4. The charge

William Earp was immediately arrested. In November, 1977 he was charged with the felony of possessing the machine gun. He was also charged with possessing stolen water skiis but that case was dismissed.

A Motion to Suppress was made in a timely manner. The trial Court Judge ruled, on February 7, 1978, that the mistatements in the affidavit were peripheral because there was an adequate basis for the search-probable cause- in the observations of the officers "of skiis at a business location other than one that would normally be expected to deal in water skiis" and the skiis were sold at prices below retail and appeared to be new. (R 190, 191)

The search warrant, affidavit, testimony of the parties and argument of counsel all showed that the warrant was for skiis and "business records or evidence related to ownership or occupancy of the premises." (R119,120,105,130)

The police knew Doug Stewart was the owner of the skiis.

The trial Judge, however, ruled that the warrant authorized a search for evidence related to ownership of the skiis, as well as ownership of the premises and therefore the issue of "plain view is irrelevant."

William Earp was found guilty at the trial itself and appealled to the State Court of Appeals. That Court in a July 30, 1979 opinion upheld the search on the grounds that "affiant alleged several hundred water skiis were stolen" from the manufacturer and he observed O'Brien water skiis for sale in a transmission shop and the trial Court made a finding they were in plain view (the trial Court had not made such a finding). The trial Judge had said "even if it was a closed box they would have been entitled to look into it." (R 192) The Appellate Court found it significant that Earp "indicated a willingness and ability to obtain a particular model of O'Brien ski."

There had been no such finding by the trial Court (R 190, 191). Earp had testified he didn't

know anything about the details of the skiis and the police verified that and even had written in to their reports "he did not know much about the skiis." (R 170 and 171) The police had testified to that in Court. (R 170) Earp testified that he didn't even know what a "competitor" ski was. (R 120)

The Court of Appeals refused to reconsider their opinion and the State Supreme Court denied review without comment, on November 9, 1979.

REASONS FOR GRANTING THE WRIT

1. The Courts below upheld a search after it was shown that the affidavit was prepared with a reckless disregard for the truth and the remaining information did not constitute probable cause; this was in direct conflict with a U.S. Supreme Court decision: Franks v Delaware.

This issue is a live issue of profound significance. Can the police exaggerate and distort facts and even insert false statements into the affidavit, when obtaining a search warrant?

The principles have been spelled out in Franks v Delaware, 438 U.S. 154, 57 L Ed 2d 667, 98 S Ct 2674. In this 1978 decision the Court held that if the defendant makes a showing of intentional mistatements or a "reckless disregard for the truth", a hearing must be held. If the defendant establishes by a preponderance of evidence the falsehoods, and if after they are deleted the remaining facts are not enough for "probable cause", the search must be voided.

Almost everything in the affidavit in the Earp case was incorrect. The police stated "hot skiis" were being "offered for sale in ten-lot sales" yet noone had told them they were "hot", noone had said skiis were being sold at Village Transmission in 10-lot sales and the police had just been there and personally observed that there were only three single skiis for sale. They mistated the prices, putting in the affidavit that the prices were way below wholesale prices, just after checking and learning the prices were consistent with wholesale prices in the area. They heard that someone in a ski shop had commented that he pur-

chased a ski in a transmission shop and instead of putting that in the affidavit they put in:

> "an unknown man, advised a dealer ..... that he purchased a stolen water ski at Village Transmission for $100.00 (emphasis added to show the false statements).

They had the wrong name for the dealer, alleged that the "burglary" was an "inside job" when in fact they had no such belief, and tried to create the impression that petitioner was very familiar with the skiis, when they knew that he knew almost nothing about them. They created the impression that the skiis were related to a burglary when, in fact, there was not a single detail about the skiis to cause any kind of suspicion. Officer Yager testified this way: (R 161)

> "Q. Are there any serial numbers on the water skiis?
>
> A. No there are not.
>
> Q. So you don't know from the skiis themselves that these had anything to do with the burglary, do you?
>
> A. No, I don't.

The false statements went to the very integrity

of the affidavit. The only facts left, after striking all incorrect information, were that petitioner was permitting his friend to try and sell three new looking water skiis there at wholesale prices.

The case is easily distinguishable from another recent ruling of the Court, Rugendorf v U.S., 376 U.S. 528, 11 L Ed 2d 887, 84 S Ct 825. Rugendorf was a case where there were mistakes in the affidavit for the search but they were obviously of peripheral relevancy. F.B.I. agents were aware of a burglary of $42,000. of mink jackets and 75 to 80 had been observed in Rugendorf's basement, with labels removed. Informants said Rugendorf's brother was a fence, Rugendorf was tied in with burglars and there had only been one burglary of that kind in the preceding six months. The only incorrect information was an allegation that the Rugendorf brothers jointly owned a meat market. The ownership had actually terminated.

Both the trial Court and Washington State Court of Appeals felt all the mistatements in petitioner's case were peripheral because

petitioner's willingness to allow the sale of three water skiis there constituted "probable cause."

The trial Court's view was that "observations of new O'Brien skiis for sale at a price substantially below retail at Village Transmission shop .. not an authorized dealer..." was enough for probable cause.

The Court of Appeals made a finding the trial Court never made. They upheld the search because "affiant alleged several hundred water skiis were stolen" from the manufacturer and he (a policeman) observed O'Brien water skiis for sale in a transmission shop ..."

These rulings are in direct conflict with numerous U.S. Supreme Court cases. For a valid search, within the authority of the 4th amendment to the U.S. Constitution, there must be reasonable or probable cause to believe that searching police will find the instrumentality of a crime or evidence pertaining to a crime. The facts must be such to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Berger v U.S. 388 U.S. 41, 18 L Ed 2d 1040, 87 S Ct 1873.

Is an attempt to sell skiis privately for a reasonable price a fact that shows a crime is being committed?

The question is of profound significance because all across the country people sell items privately, sometimes brand new items, because of divorce, death in the family, shortage of cash, ill health and endless other reasons. If the search is upheld in petitioner's case that is precedent for a search any time there is a private sale!

In petitioner's case, after the false material is stripped away, there isn't one fact to even justify a suspicion or hunch of wrongdoing.

There has to be some probability of criminal wrongdoing. What could this be, if one friend is simply permitting another to sell some skiis?

A case might help clarify. In Chambers v Maroney, 399 U. S. 42, 26 L Ed 2d 419, 90 S Ct 1975, police were aware that suspects of a shooting were in an older car, a police officer saw an older car with a bullet hole in it and it sped up when he chased it. That was held not to be enough for "probable cause" for a search.

A simple assertion of suspicion is not enough. Spinelli v U.S., 393 U.S. 410, 21 L Ed 2d 637, 89 S Ct 584. (gambling case-F.B.I. had a tip Spinelli was operating a gambling business and they observed two phones in his apartment; he was "known as a bookmaker" - held: not enough for probable cause).

In petitioner's case, the only facts left for "probable cause" was the attempted private sale of three skiis. There weren't even facts justifying any suspicion.

This conflict with U. S. Court decisions on such significant constitutional questions justifies the grant of certiorari to review the judgment below.

2. The Courts below upheld an exploratory search, in direct conflict with principles laid down by the U. S. Supreme Court.

The search warrant in petitioner's case was for skiis and "any business records or evidence related to ownership and occupancy of the premises." In the beginning of the search, they seized all the evidence they needed "related to ownership of the premises": a utility bill,

property tax statement, business cards and a bank statement. But they continued to search, not just in areas where skiis might be found, but in car hoods, interiors of sofas and chairs, lockers, through stacks of magazines and on through every part of the shop and yard and in to adjacent properties.

The officer who found the gun admitted he was not looking for skiis or evidence of ownership of the premises. It was an exploratory, general search.

Assuming for purposes of argument that the search was proper in its inception, can the searchers go beyond the limits of the warrant, in the scope and intensity of the search?

Supreme Court cases clearly say no. Terry v Ohio, 392 U.S. 1, 20 L Ed 2d 889, 88 S Ct 1868. The scope and intensity is strictly limited by the warrant. The 4th amendment definitely prohibits a full blown search.

There must be nothing left to the discretion of the officer. Marron v U.S. 275 U. S. 192, 72 L Ed 2d 231, 48 S Ct 74.

Even if something is found in plain view,

that alone does not justify the search, if it is a general one. "The plain view doctrine may not be used to extend a general exploratory search from one object to another until somethin incriminating at last emerges. Coolidge v New Hampshire 403 U. S. 443, 29 L Ed 2d 564, 91 S Ct 2022.

The officer was no longer looking for items in the warrant so was not in a place he was entitled to be and the discovery was not inadvertant.

3. The U.S. Supreme Court should review the facts because petitioner was denied the right to be free of results of an unreasonable search because the Courts below made findings of fact when the record was totally devoid of evidentiary support.

Both the trial Court and the Washington State Court of Appeals made crucial errors in their treatment of the facts. The trial Court ruling was that the entire search was justified because the phrase in the warrant "evidence of ownership of the premises" meant evidence of ownership of the skiis.

There was not a single bit of evidence to

support this finding. The testimony, the search warrant, the affidavit and even argument of counsel all clearly show that everyone understood the warrant to be for only "evidence of ownership of the premises". (R 105, 119, 120, 130)

The trial Judge went on to hold that it was not necessary for him to decide if the gun was in plain view since they could look for evidence of ownership of the skiis. The Court of Appeals rested their opinion on the trial Judges' "Finding" that the gun was in plain view! A perusual of the record will show by a preponderance of evidence the gun was in a closed box. (R 131-133)

Normally the U.S. Supreme Court won't re-examine Findings of Fact of the State Courts but where a Federal right has been denied as a result of Findings of Fact that are without support in the record, the Court will review State Court findings. Fiske v Kansas 274 U.S. 380, 71 L Ed 1108, 47 S Ct 655.

In petitioner's case, the trial Court omitted to pass upon the important question of plain

view. A State Court cannot deprive a litigant of a Federal right, by failing to pass upon basic questions of fact. The Supreme Court itself will examine the record to determine what facts reasonably might be found. Brooklyn Savings Bank v O'Neil, 324 U.S. 697 87 L Ed 563, 65 S Ct 117, Carlson v Washington, 234 U.S. 103, 58 L Ed 1237, 34 S Ct 717. A reading of the record will show that one of the main issues of the suppression hearing was whether or not the "plain view" doctrine applied and the trial Judge completely side-stepped the issue. The preponderance of the evidence shows the discovery was not inadvertant and the gun was in a closed box in a remote storage area.

The Court, in the past, has granted certiorari to review matters of evidence where the decision below seems to be shockingly wrong (Thompson v City of Louisville (due process case) 362 U.S. 199 and should do so here.

4. The police should not be able to continue searching for evidence if it is cumulative to the degree it isn't relevant.

The question arises, on whether the police

did have a right to keep searching on the theory that they were looking for evidence of ownership of the premises. Such a search would have been for evidence that was cumulative as they had, at the beginning, all the evidence they needed to establish that petitioner owned the shop (business cards, tax statements, bank records, utility bill, R 170)

Once the police have what they were seeking, it is improper for them to keep going. In, Lo-Ji Sales, Inc. v N.Y., ___ U.S. ___, 60 L Ed 2d 920, 99 S Ct ___, a search warrant was issued for obscene films "and printed matter portraying similar activities." Eleven men, including a Justice of the Peace, conducted the 6 hour search, seizing 397 magazines and 431 reels of film. The Supreme Court declared the search invalid because of "the open ended warrant", ("other similar items") and the fact that police could have taken a few samples and that would have sufficed. By going on, the searchers turned the search into an unauthorized extensive search.

There is is an argument, as an analogy,

in U. S. v Lefkowitz, 285 U.S. 452, 76 L Ed 2d 877, 52 S Ct 420, a case involving a search incident to an arrest for illegally selling intoxicating liquor. As part of the arrest, police went into waste baskets, desks and cabinets and the U.S. Supreme Court said that was forbidden. In Kremen v U.S., , 353 U.S. 346, 1 L Ed 2d 876, 77 S Ct 828, the U.S. Supreme Court also ruled that the sheer quantity taken can invalidate a search. F.B.I. agents removed most of the contents of a house, even a toothbrush and beer can opener.

The general rules, in Supreme Court cases, are clear on this issue but the precise point is unsettled to an extent and therefore should be reviewed by the Supreme Court.

5. The warrant affidavit was based on tips that were only conclusory and without any details or underlying circumstances showing the informants were credible or the information reliable.

The basic points in the affidavit were mistatements and arguments on that are presented above. The State Courts should also have de-

clared the search invalid pursuant to Aguilar v Texas, 378 U.S. 108, 12 L Ed 2d 723, 84 S Ct 1509. In the Aguilar case, the police had obtained a search warrant after stating in the supporting affidavit that they "received reliable information from a credible person ...." that narcotics were on the premises. The search was declared invalid because there were no underlying circumstances to enable the magistrate independently to judge the validity of:

A. The informant's conclusion that narcotics are where they are said to be, and,

B. That the informant or his information was reliable.

In the Spinelli case, cited above, the F.B.I. had an anonymous tip that Spinelli was operating a gambling operation and this was corroborated by an F.B.I. agent who had been watching Spinelli, "a known bookmaker", who had two phones in his apartment.

The U. S. Supreme Court ruled that the search was invalid because these statements, which were set forth in the warrant affidavit, were only conclusory. No reasons were set

forth in the affidavit to support the informants' conclusion. The description of "the tip did not contain a sufficient statement of the underlying circumstances from which the informer concluded the Spinelli was running a bookmaking operation."

The treatment of petitioner's case in the Courts below is in direct conflict with the Spinelli and Aguilar cases.

The affidavit in petitioner's case stated, that a citizen informant advised police that stolen skiis were being sold at Village Transmission and that informant based his information on a call from one Walter Schaplow who offered to arrange a sale of hot skiis.

When did the informant get this call? Was there any personal observation by anyone? Where?

The affidavit went on to say that a Bellevue, Washington dealer heard from an "unknown young man" that he purchased a stolen ski at Village Transmission, for $100.00.

There is nothing known about this "young man" because, as the affidavit states, "he left before the dealer could ascertain his name or

address."

There are no details to establish whether this unknown young man is reliable. There are no facts about when, how or with whom, he purchased the ski. There is nothing given to show how he concluded that it was a stolen ski. It is a mere assertion that the ski is stolen. U.S. v Harris, 403 U.S. 573, 29 L Ed 2d 723, 91 S Ct 2075.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Washington State Court of Appeals.

Respectfully submitted,

MICHAEL W. HERB
6132 196th S.W.
Lynnwood, WA 98036
Counsel for Petitioner

DONALD HUGH HEDGES
6132 196th S.W.
Lynnwood, WA 98036
Co-Counsel for Petitioner

APPENDIX

EVERETT DISTRICT COURT

SNOHOMISH COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON)
: ss.
COUNTY OF SNOHOMISH)

No. SW # 77-110

AFFIDAVIT FOR SEARCH WARRANT

Howard M. DeLong, being first duly sworn on oath, deposes and says:

That on or about the 27th day of July, 1977, in Snohomish County, Washington, a crime, to wit: Possession of Stolen Property was committed or reasonably appears about to be committed; that the following evidence of said crime, contraband or fruits of said crime, or weapons or things by which said crime has been committed or reasonably appears about to be committed, to-wit: O'Brien water skiis, particularly the "Competitior", "World Team Comp", "Wood Comp" and "Exhibition Comp" models, and any business records or evidence related to ownership or occupancy of the premises is material to the investigation or prosecution of the above-described crime or crimes which reasonably appears

about to be committed and that affiant verily believes the above evidence is concealed in or about a particular house or place, to-wit: 23710 Highway 99 in Edmonds, the same being the premises of the Village Transmission Shop in said county and state; that affiant's belief is based upon the following facts and circumstances: That your affiant is a Detective with the Everett Police Department and has been a law enforcement officer for the past eleven years;

That he has been engaged in a joint investigation with the Redmond Police Department and specifically Detective Gerald Yager of that agency, the information set forth below being based on the work of both agencies;

That on March 5, 1977, the O'Brien water ski manufacturing plant in Redmond was burglarized and 341 water skiis were stolen;

That investigation into that burglary disclosed that someone with "inside knowledge" participated in the crime;

That a citizen informant advised police on or about July 19, 1977, that the stolen skiis were being sold at the Village Transmission Shop,

described above;

That this informant has no prior criminal record, to the best of your affiant's knowledge, and based his information upon a telephone call he received from one Walter E. Schaplow of Lynnwood, who reportedly offered to arrange a sale of "hot" water skiis in ten-lot sales for $85.00 per lot;

That on or about July 22, 1977, an unknown young man advised a dealer of O'Brien water skiis, Precision Specialty, Inc. of Bellevue, Washington, that he had purchased a stolen O'Brien water ski, "Competitor" model at the Village Transmission Shop in Edmonds for $100.00;

That this information was relayed to police, however the young man left before the dealer could ascertain his name or address;

That in the telephone call mentioned above, Mr. Schaplow allegedly reported that the skiis had been stolen from the O'Brien manufacturing plant and that the brother-in-law of the owner of the Village Transmission Shop took part in the burglary;

That investigation had disclosed the owner of the Village Transmission Shop to be one

William J. Earp and that one Robert Gary Wirtz is his brother-in-law;

That Mr. Wirtz lives in Edmonds and has a prior arrest record for larceny;

That on July 27, 1977, your affiant went to the Village Transmission Shop and observed three (3) O'Brien water skiis for sale, with price tags as follows: "World Team Comp" ($95.00), "Wood Comp" ($85.00), and "Exhibition Team Comp" ($75.00);

That your affiant has ascertained that the manufacturer's wholesale cost to franchised dealers is as follows: "World Team Comp" ($175.00), "Wood Comp" ($165.00), "Exhibition Team Comp" ($135.00), and "The Competitor" ($210.00);

That while at the shop, Mr. Earp advised your affiant that he would inquire to see if he could get and sell to your affiant a "Competitor" ski, leading your affiant to believe that Mr. Earp could arrange a sale of that ski;

That Mr. Earp is not listed as a dealer for O'Brien skiis;

That based upon the foregoing, your affiant

believes the crime of possession of stolen property is presently being committed at the above premises and that evidence of this crime, as noted above, and evidence relating to this crime, specifically business records and any evidence relating to ownership and occupancy of the premises, is presently to be found therein.

Howard M. DeLong

SUBSCRIBED and SWORN to before me this 29th day of July, 1977.

Donald Priest
JUDGE

George Bowden
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON, Plaintiff vs. WILLIAM EARP, Defendant	) No. 8818)) ORDER DENYING) DEFENDANT'S) MOTION TO) SUPPRESS) EVIDENCE

This matter having come on regularly for hearing upon the defendant's motion to suppress evidence, and the Court having heard the testimony of witnesses and the argument of counsel and being fully advised in the premises, Now Therefore, the Court finds:

1. The police had sufficient information of suspicious circumstances to make a visit to the Village Transmission Shop and their subsequent observations of new O'Brien skiis for sale at a price substantially below retail at Village Transmission Shop, which was not an authorized dealer of O'Brien skiis, provided an adequate basis for the finding of probable cause for the issuance of the search warrant.

2. The search warrant authorized not only a search for skiis and evidence related to ownership and occupancy of the premises, but for records relating to ownership of the skiis as well. The machine gun was found within the scope of the search warrant and whether it was in plain view is irrelevant.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant's motion to suppress is denied.

DATED this 7th day of February, 1978.

John E. Rutter
JOHN E. RUTTER, Judge

Presented by:

John F. Segelbaum
JOHN F. SEGELBAUM
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON, Plaintiff	)	No. 8818
vs.	)	JUDGMENT AND
WILLIAM J. EARP, Defendant	)	SENTENCE

On February 6, 1978, this cause came on for trial, the defendant having waived his right for jury trial, the defendant having been charged with the crime of Unlawful Possession of a Machine Gun committed on or about the 29th day of July, 1977, in Snohomish County, Washington, and being represented by his counsel, Mike Herb.

On February 6, 1978, came John F. Segelbaum Deputy Prosecuting Attorney, and the defendant, WILLIAM J. EARP was brought before the Court with his counsel, Mike Herb, it appearing of record that the defendant was convicted on the 6th day of February, 1978, of the crime of Un-

lawful Possession of a Machine Gun, and it appearing that a presentence investigation was ____ ordered. The court advised the defendant:

(1) of his right to appeal;

(2) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right of appeal is irrevocably waived;

(3) that the superior court clerk will, if requested by defendant appearing without counsel, file a notice of appeal in his behalf; and

(4) of his right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal.

It appearing from the finding of guilty that the defendant is guilty of Unlawful Possession of a Machine Gun as charged, and having been asked by the Court if he had any legal cause why the judgment and sentence of the Court should not be pronounced, and no cause being shown, Now Therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant is guilty of the crime of Unlawful Possession of a Machine Gun

and that he be punished therefor by imprisonment in such correctional institution under the supervision of the Department of Social and Health Services, Division of Institutions, as shall be designated by the Secretary of the Department of Social and Health Services, for a maximum term of five (5) years.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the execution of said sentence is hereby deferred pursuant to the provisions of RCW 9.95.210, and the defendant is placed on probation for a period of four (4) years, upon the following conditions, to-wit:

1. The defendant shall report to the Department of Social and Health Services, Division of Institutions, Adult Probation and Parole, or such officer as the Department shall designate, and follow implicitly the instructions of said Department or its agent, and such rules as said Department shall promulgate for the conduct of said defendant during the term of probation.

2. The Court shall have authority during the course of probation to revoke, modify or

change its order of suspension of sentence as provided by law.

3. The defendant shall not pay attorney's fees. Fees, if required to be paid, shall be computed by the Department of Assigned Counsel. Fees shall be paid within _____.

4. The defendant shall __ pay court costs. Costs, if required to be paid, shall be computed by the Clerk of the Court. Costs shall be paid within two (2) years, and there will be the following limitation on costs: to be paid in equal monthly installments.

5. The court will entertain a motion to review probation after three (3) years.

6. The defendant shall pay a fine in the amount of $1,500.00 to be paid in equal monthly installments and shall be paid in full within two (2) years.

7. If an appeal is filed, the above payments shall be paid into defense counsel's trust account.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the appearance bond or bail, if such has been required in this cause, and if

not previously forfeit, is exonerated, and the Clerk of Court is authorized to release such to the appropriate person or persons.

DONE IN OPEN COURT this 16th day of May, 1978.

Dennis J. Britt
DENNIS J. BRITT, JUDGE

Presented by:

John F. Segelbaum
JOHN F. SEGELBAUM
Deputy Prosecuting Attorney

Copy received and
approved for entry:

Michael W. Herb
MICHAEL W. HERB
Attorney for Defendant

Copy received:

Waives presence at signing
WILLIAM EARP
Defendant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON, Plaintiff,	) NO. 8818
vs.	) ORDER ON APPLICATION FOR STAY
WILLIAM EARP, Defendant.	)

THIS MATTER having come on regularly upon the application of WILLIAM EARP for a stay of imposition of the judgment and sentence in this case pending the filing and review of a petition for writ of certiorari in the U.S. Supreme Court and this Court being fully advised now therefore,

IT IS HEREBY ORDERED that paragraph VII of the judgment and sentence is amended to read: "That within ten (10) days of this date, the defendant is to have deposited $1,500 into a Federally insured savings and loan account, No. 1-21000 127, of Family Saving's and Loan, and there are to be no withdrawals without court order from said account."

IT IS FURTHER ORDERED that probationary reporting is not required during the pendency of the action on the Petition for Writ of Certiorari in the U.S. Supreme Court.

DONE IN OPEN COURT this 22nd day of January, 1980.

Dennis J. Britt
JUDGE

Presented by:

Michael W. Herb
MICHAEL W. HERB
Attorney for Defendant

Approved as to form:

Steve Kochen
STEVE KOCHEN

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 6574-I
v.	)	DIVISION ONE
WILLIAM J. EARP, Appellant.	)	FILED July 30, 1979

DORE, FRED, J. -- William Earp appeals from a judgment and sentence for unlawful possession of a machine gun. We affirm.

ISSUES

ISSUE 1. Did the trial court err in refusing to suppress evidence seized in a search conducted pursuant to a warrant?

ISSUE 2. Was the defendant entitled to dismissal for failure to comply with the 90 day rule, CrR 3.3?

FACTS

On July 29, 1977, police obtained a search warrant for the Village Transmission shop in Edmonds. The supporting affidavit alleged in part that the O'Brien water ski manufacturing

plant in Redmond had been burglarized on March 5, 1977, and 341 water skiis were stolen. Acting on information that O'Brien water skiis were at Village Transmission, the police officer-affiant went there and observed three O'Brien water skiis for sale. Earp, the owner of Village Transmission, told the affiant that he would see if he could get and sell him a particular O'Brien "Competitior" model water ski. Earp was not a listed dealer of O'Brien water skiis.

Based on the above allegations, the search warrant was issued for O'Brien water skiis and any business records or evidence related to ownership or occupancy of the premises. In the course of their search, police officers found a machine gun and a quantity of ammunition in an upstairs office and storage area. The officer who discovered the machine gun testified that it was on top of a cardboard carton in the storage area and visible from the doorway.

Earp was arrested for possession of stolen property on July 29, 1977; he appeared in Everett District Court the same day and was released on personal recognizance. On August 1, 1977,

a provisional order of release and exoneration was entered on the stolen property charge.

On November 28, 1977, Earp was charged in Snohomish County Superior Court with unlawful possession of a machine gun. He was arraigned on December 12, 1977 and released on personal recognizance. Earp later moved to dismiss for violation of CrR 3.3, and suppress evidence seized during the search. Both motions were denied. On February 6, 1978, trial was held on stipulated facts and Earp was found guilty of unlawful possession of a machine gun.

DECISION

ISSUE 1. Search and Seizure.

If, in the judgment of the issuing magistrate, there has been an adequate showing under oath of circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be seized, the warrant is valid. State v Patterson, 83 Wn. 2d 49, 515 P. 2d 496 (1973). The affiant alleged that several hundred water skiis had been stolen from the O'Brien water ski manufacturing plant and that, acting on a

tip,[1] he had observed O'Brien water skiis for sale in a transmission shop. Earp, the owner of the shop, was not listed as a dealer of O'Brien water skiis but indicated a willingness and ability to obtain a particular model of O'Brien water ski for sale. These allegations go beyond suspicion and personal belief to provide a substantial basis for the issuance of a search warrant, based on probable cause to believe that stolen water skiis would be found at Village Transmission. See State v. Patterson, supra.[2]

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[1] A tip may be the initial impetus giving rise to subsequent corroborative observations by police to support the existence of probable cause which may not be found on the tip alone. State v. McGee, 15 Wn. App. 563, 550 P. 2d 552 (1976)

[2] The affidavit contains some factual errors conceded by the State. We do not believe, however, that evidence seized in the search must be suppressed as a result. Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. State v. Goodlow, 11 Wn. App. 533, 523 P. 2d 1204 (1974). The court made no such finding in this case.

We find no merit in Earp's contention that the search went beyond the scope of the warrant and the machine gun was not in plain view. The officers found the machine gun in an upstairs office and storage area on the premises described in the warrant and there was testimony from which the trial court could find that it was in plain view. The office and storage area were reasonable places in which to search for the water skiis and business records.

ISSUE 2. Speedy Trial.

An appearance in court prior to being charged does not constitute a "preliminary appearance" for the purpose of commencing the running of the timely trial limits of CrR 3.3 unless the person was being held to answer for the offense in question at the time of such appearance. State v. Watson, 15 Wn. App. 629, 551 P. 2d 133 (1976). Earp was not held to answer on the machine gun charge until his arraignment on December 12, 1977. He was brought to trial on February 6, 1979. The requirements of CrR 3.3 were met.

Affirmed.

Dore, Fred, J

WE CONCUR:

James, J Swanson, J

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040 IT IS SO ORDERED.

Keith Callow
CHIEF JUDGE

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 6574-1
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
WILLIAM J. EARP, Appellant.	)	

The appellant, William J. Earp, having filed his motion for reconsideration and the court having determined that it should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

Dated this 20th day of August, 1979.

Herb Swanson
Acting Chief Judge

THE SUPREME COURT
State of Washington

Olympia
98504

November 9, 1979

Mr. Michael W. Herb
Attorney at Law
6132 196th S.W.
Lynnwood, Washington 98036

Honorable Russ Juckett
Prosecuting Attorney
Mr. John F. Segelbaum, Deputy
Snohomish County Courthouse
Everett, Washington 98201

Counsel:

Re: Supreme Court No. 46528-State v. William J. Earp, Court of Appeals No. 6574-I

Following consideration of the above entitled petition for review on November 9, 1979, the following notation order was entered on page 217, Vol. 1, of the petition for review dockett;

"DENIED"

/s/ Robert F. Utter
Chief Justice

Very truly yours,

John J. Champagne
JOHN J. CHAMPAGNE
Clerk